STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2003
v	No. 238143 Oakland Circuit Court
BRYAN LEE VARNER, Defendant-Appellant.	LC No. 01-178747-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant pleaded guilty of possession of marijuana, MCL 333.7403(2)(d), and reckless driving, MCL 257.626, and was convicted at a bench trial of fourth-degree fleeing and eluding, MCL 750.479a(2).[1] He was sentenced to eighteen months' probation. He appeals as of right, challenging his fleeing and eluding conviction on the grounds of insufficient evidence, ineffective assistance of counsel, violation of due process, and violation of the protection against double jeopardy. We affirm.

I

Trooper Steve Unruh testified that he was on duty at about 9:00 p.m. on the evening of the incident in a fully marked and identified state police patrol vehicle. He described himself and another trooper, Trooper Gavin, who was in a separate car, as being positioned at a point on the right shoulder of the Coolidge entrance ramp to eastbound I-696, having received a dispatch that citizens had called in reports of motorcycles racing on the freeway. Trooper Unruh testified that two motorcycles went traveling by at "an extremely high rate of speed." The motorcycles were weaving in and out of traffic. From looking at his speedometer while following them, Unruh determined that they were traveling at a top speed of around 125 miles per hour before they eventually drove onto the I-696/I-75 interchange.

Trooper Unruh testified that defendant's motorcycle started to enter the ramp for northbound I-75, but then slowed down enough to quickly move to the entrance ramp to

[1] The judgment of sentence incorrectly indicates that defendant's fleeing and eluding conviction resulted from a guilty plea.

southbound I-75, which was where the other motorcycle went. Unruh activated his car's lights and siren. Unruh came within approximately ten feet of defendant and was able to read defendant's license plate. Unruh called out the plate, and defendant looked to his right and back, although traffic was coming from his left, and then accelerated again.

When asked what was significant about defendant's looking to the right rather than the left, Trooper Unruh replied that there was no traffic to the right and there was a "big wall" there. He said that defendant "didn't totally turn around, but his head was geared towards the back, towards me." Unruh opined that "obviously nine o'clock at night in May it's a little bit darker" and that "[y]ou're going to see some kind of flashing, strobing like, uh, reflecting on any – any of the part [sic] of the surrounding landscape." Unruh testified that defendant eventually slowed down because another vehicle was in front of him, which allowed Unruh to pull right beside defendant and tell him to pull over, while also using his hand. Unruh testified that he and a trooper in another car were trying to block defendant's motorcycle and that defendant stopped and was arrested. He indicated that there was a distance of about one mile between when defendant first looked back and when he pulled over. Trooper Unruh acknowledged that defendant did not try to flee after the point when he pulled up next to defendant, although he imagined "it possibly could [have been] different" if there had not been a vehicle in front of defendant.

Defendant testified that he was riding a "996 Supra," which is a "V-Twin" motorcycle and is loud. He further said that it had "custom slip-on racing pipes" that made it "very, extremely loud." Defendant acknowledged that he had traveled on I-696 at speeds that were probably in excess of 120 miles an hour and that he was cutting in and out of traffic. He testified that when he accelerated on the entrance ramp to southbound I-75 he did not know there was a state trooper behind him chasing him. Defendant said that he never tried to flee or elude the trooper, but rather indicated that he immediately started slowing down when he first saw the trooper motion him to pull over. He also testified that, if he had wanted to flee, he could have done so.

The trial court made oral findings of fact in support of its verdict that defendant was guilty of fourth-degree fleeing and eluding. The court stated that it believed Trooper Unruh's testimony that he got within ten or fifteen feet of defendant. The trial court noted that it was "dusk or dark out, uh, 9 p.m." and stated that it was satisfied "at that point beyond a reasonable doubt the Defendant knew that the trooper was behind him." The trial court said that, in looking at a videotape from the patrol car, "every other car in the area, uh, didn't seem to have any problem realizing what was going on," and referred to Trooper Unruh's testimony about having some experience with a similar motorcycle and that, even with a helmet on, "you certainly are aware of what's going on." The trial court also referred to defendant turning to the right as indicating his "awareness that something was going on."

II

Defendant first argues that his constitutional right to due process has been violated because the prosecution failed to file with this Court maps that were admitted as exhibits at trial. The prosecution states that it has been unable to locate these exhibits despite diligent efforts. Defendant asserts that these maps show that, contrary to the mistaken testimony of both Unruh and defendant, and the impression of the trial court, the distance between the point where

Trooper Unruh first activated his siren and overhead lights and where defendant stopped his motorcycle was only one-half of a mile rather than approximately a mile. The parties describe these exhibits as consisting of maps of the relevant area, including the I-696/I-75 interchange. We agree with the prosecution that the layout of the freeways and interchange in question is subject to judicial notice because it is not subject to reasonable dispute. See MRE 201(b) (describing types of adjudicative facts subject to judicial notice because they are "not subject to reasonable dispute"). Accordingly, the absence of the maps in question does not prevent this Court from considering arguments related to the layout of the freeways and interchange. And, contrary to defendant's argument that lack of access to the maps limits his ability to frame arguments for appeal, he too is able to advance arguments related to the actual layout of the freeways. We conclude that defendant has shown no prejudice resulting from the prosecution's failure to provide the maps to this Court.

III

Defendant also argues that the trial court erred by considering a videotape that was not admitted into evidence. In this regard, Trooper Unruh testified that there was a videotape of the incident. The following exchange ensued between counsel and the trial court:

> [*The prosecutor*]: If there's no objection, we'd ask to play the video tape as Exhibit No. 4.
>
> [*Defense counsel*]: We have no objection, your Honor.
>
> *The Court*: And would you stipulate this is the video tape of what occurred that day?
>
> [*Defense counsel*]: Assuming it's the same I saw, I certainly will.

The videotape was then played, with Unruh describing what was being shown. Unruh testified that the recording was made from Trooper Gavin's car. The trial court never expressly stated that it was admitting the videotape into evidence. However, after Trooper Unruh's testimony, the prosecutor said that the videotape had "already been admitted" and indicated that Trooper Gavin was available for cross-examination, but defense counsel declined to cross-examine him. After the end of testimony at trial, the following exchange took place:

> *The Court*: Okay. You know what? Can I, um – do you have the video? Do you mind if I take a real quick look at it?
>
> [*Defense counsel*]: No, but I wanted to co – certainly, Judge, *I would like you to look at it again*, but I want to comment before you do. (emphasis added).

Also, defense counsel replied, "Sure, Judge," when the trial judge indicated that, if there was no objection, he would like to take the videotape and watch it on the video player in his office before closing arguments.

In *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), our Supreme Court held that a defense counsel's affirmative approval of the trial court's conduct constituted "a waiver that *extinguishes* any error" (emphasis in original). With regard to the videotape at issue, defense counsel affirmatively approved the trial court's consideration of this videotape by stating that he would like the trial court to look at it, and thus waived review of this issue.

IV

Defendant next argues that his dual convictions of both reckless driving and fourth-degree fleeing and eluding based on the same incident violate the federal and state constitutional protections against double jeopardy. We disagree. In this multiple punishment context, the constitutional protections against double jeopardy are "designed to ensure that courts confine their sentences to the limits established by the Legislature." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). Thus, the double jeopardy analysis focuses on whether there is a clear indication of legislative intent to impose multiple punishment. If there is, there is no double jeopardy violation. *Id.* at 695-696; *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003). At pertinent times, MCL 750.479a(9), the fourth-degree fleeing and eluding statute, provided, in pertinent part:

> Except as otherwise provided, a conviction under this section does not prohibit a conviction and sentence under any other applicable provision for conduct arising out of the same transaction.[2]

Accordingly, based on the Legislature's clear statement in MCL 750.479a(9), defendant's dual convictions of both reckless driving and fourth-degree fleeing and eluding do not violate the constitutional protections against double jeopardy.

To the extent that defendant challenges his fleeing and eluding conviction on the basis that his trial on the fleeing and eluding charge was a separate proceeding after his guilty plea to reckless driving, we reject this argument where the plea and the bench trial were part of a single prosecution and occurred during one continuous proceeding. Our Supreme Court has held that to guard against double jeopardy "all charges against a defendant that arise out of a single criminal act, occurrence, episode, or transaction must be brought in one prosecution." *People v Veling*, 443 Mich 23, 36-37; 504 NW2d 456 (1993). In this case, the charges of reckless driving and fleeing and eluding were brought in one prosecution. Defendant simply elected to plead guilty to the reckless driving charge, but to contest the fleeing and eluding charge. Accordingly, defendant has not established a violation of his constitutional protections against double jeopardy.

V

Next, defendant argues that there was insufficient evidence to support his conviction of fourth-degree fleeing and eluding. We disagree. In deciding whether sufficient evidence was

[2] Identical statutory language is codified as MCL 750.479a(8) in the current version of the statute.

presented to support a conviction, we must view the evidence in a light most favorable to the prosecution and decide whether any rational factfinder could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). With regard to fourth-degree fleeing and eluding, MCL 750.479a(1)[3] states:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by *increasing the speed of the vehicle*, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle. [Emphasis added.]

MCL 750.479a(2) generally provides that a violation of MCL 750.479a(1) constitutes fourth-degree fleeing.[4] Thus, this statute "criminalizes the conduct of a person who fails to obey the direction of an officer by 'increasing the speed of the vehicle, extinguishing the lights of the vehicle, or *otherwise* attempting to flee or elude . . . .'" *People v Grayer*, 235 Mich App 737, 740; 599 NW2d 527 (1999), quoting MCL 750.479a(1) (emphasis provided in *Grayer*).

Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003). Minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Trooper Unruh testified that, after he activated his overhead lights and sirens, defendant looked back toward him and then accelerated his motorcycle. Trooper Unruh also indicated that he was in a fully marked state police patrol vehicle at the time of the incident and replied affirmatively when asked if he had "uniform badges and insignia" that indicated he was a police officer. From this, a reasonable factfinder could reasonably have determined that defendant wilfully increased his speed in an effort to flee a uniformed police officer in a car identified as an official police vehicle. Thus, there was sufficient evidence to support defendant's conviction of fourth-degree fleeing and eluding.

VI

Finally, defendant asserts that he received ineffective assistance from his trial counsel. We conclude that defendant is not entitled to relief on this issue. To establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). With regard to the prejudice requirement, a defendant must show a

[3] The current language of this subsection is identical to that in effect at the time of the incident.

[4] Fourth-degree fleeing and eluding is the least serious degree of fleeing and eluding. The statutory scheme requires proof of additional elements for the more serious degrees of fleeing and eluding.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This means a probability sufficient to undermine confidence in the outcome. *Id.*

Defendant first refers to an alleged failure by trial counsel to obtain a copy of the videotape involved in this case "either at or after Preliminary Examination and before trial," with the result that defendant had only seen portions of the tape at trial. It appears, however, that defense counsel had viewed, and was familiar with, the tape. Defendant has not shown how his own lack of familiarity with the tape affected the outcome of the trial. Similarly, assuming that defendant is correct that the actual distance involved was one-half mile, rather than one mile, defendant has not established that this fact would have affected the court's determination of guilt.

Defendant argues that trial counsel failed to emphasize that Trooper Unruh admitted not knowing if defendant actually saw him at a particular point. However, there is no reasonable probability that this affected the outcome of the trial, because the importance of Trooper Unruh's testimony with regard to defendant's conduct was his description of that conduct, not his subjective belief about whether defendant saw him.

Defendant claims that trial counsel should have objected to Trooper Unruh's testimony about the noise made by defendant's motorcycle on the ground that this was based on an erroneous comparison with a totally different motorcycle that Trooper Unruh had driven in the military. However, Unruh testified that the motorcycle he once had was "very much like" the one defendant was driving and that he could "always hear sirens and stuff like that on my motorcycle," even while wearing a helmet and headphones. This was sufficient to reasonably support a conclusion that the motorcycles were similar enough for Trooper Unruh's testimony in this regard to be relevant. While defendant testified that he had talked to the trooper about the kind of motorcycle the trooper had and that it was not as loud as defendant's motorcycle, this conflict affects only the weight or credibility of Trooper Unruh's testimony about his motorcycle, not its admissibility. Trial counsel was not ineffective for failing to object to the testimony at issue. *Riley, supra* at 142.

Defendant asserts that trial counsel should have objected to alleged "speculation" by Trooper Unruh that he did not believe that hearing the sirens would be difficult, and that strobing from the police car's lights would be seen reflecting on the surrounding landscape. However, such testimony was lay opinion testimony properly admissible under MRE 701, because it was rationally based on Trooper Unruh's perceptions and was helpful to the determination of a fact in issue, i.e., whether defendant was aware of the sirens and lights. Defendant also faults trial counsel for not objecting to "speculation" by Unruh that that the presence of a particular car played a role in defendant slowing down his motorcycle, and eventually stopping. However, the underlying facts based on Unruh's observations were made known to the court, as trier of fact, and we presume that the court made its own evaluation regarding the significance to be attached to defendant's stopping when he did.

Defendant argues that trial counsel was ineffective for failing to object to testimony from Trooper Unruh in response to a question by the prosecutor as to what suggested to him that the person he was pursuing was aware he was being pursued. We see no impropriety in this question and no ineffective assistance in the failure to object.

Defendant claims that trial counsel was ineffective for failing to object to testimony from Trooper Unruh that involved the use of a speedometer to estimate defendant's speed, on the ground that this lacked scientific foundation. However, this was in the realm of reasonable trial strategy, given that defendant had pleaded guilty of reckless driving in this case and acknowledged driving at speeds in excess of 120 miles an hour. It is apparent that the defense at trial attempted to portray defendant as credible in large part because he acknowledged his responsibility in terms of reckless driving (while denying that he intentionally failed to stop when signaled by the police). Trial counsel could reasonably have feared that objecting to Trooper Unruh's testimony about defendant's speed would have appeared inconsistent with defendant's emphasis on his forthright acknowledgment of reckless driving. In addition, it was reasonable for trial counsel not to object to testimony reflecting that defendant was operating his motorcycle at a high rate of speed because it is apparent that this would correlate with the motorcycle making more noise and could be used as an additional consideration in support of defendant's claim not to have heard sirens. Also, because the fact that defendant was driving at high speeds was undisputed, there is no reasonable probability that trial counsel's failure to object in this regard affected the outcome of the trial.

Defendant claims that trial counsel should have asked to strike testimony from Trooper Unruh that he doubted defendant would try to rear-end a vehicle, as impermissible speculation. However, it is readily apparent that this testimony was unimportant to the critical issue whether defendant intentionally failed to stop when signaled to do so. Thus, there is no reasonable probability that trial counsel's failure to move to strike this testimony affected the outcome of the trial.

Defendant asserts that trial counsel was ineffective for failing to object to the videotape viewed during trial and in chambers by the trial court on the basis that a proper foundation was not established, and by failing to object to the trial court's consideration of the videotape because it was never marked or admitted by the trial court as an exhibit. However, Trooper Unruh's testimony provided sufficient foundation to support a determination that the tape depicted a portion of the events that transpired during the incident. Similarly, if defendant had timely objected that the videotape was not formally admitted, the trial court would likely have admitted it at that point, in which case it still would have considered the videotape.

Defendant claims that trial counsel was ineffective for failing to advance the double jeopardy argument, which we rejected above. In light of our analysis, trial counsel was not ineffective for failing to make such a meritless objection.

Defendant argues that trial counsel should have asked the trial court to actually experience operating defendant's motorcycle or at least view it with its engine running at speeds of 120 miles an hour. However, in light of defendant's failure to raise his ineffective of assistance counsel claim below, this argument is not adequately supported. It is conceivable that trial counsel may reasonably have feared that the trial court would conclude from such a demonstration that the motorcycle was not as loud as defendant indicated in his testimony.

Defendant asserts that trial counsel should have asked the trial court to reconsider its finding of guilt based on its "impermissible" reliance on the videotape and use of inferences based on conjecture or unproven facts. However, we conclude that trial counsel's performance in this regard was not below an objective level of reasonableness because it may have been

sound strategy to conclude, as the prosecution suggests, that, once the trial court had found defendant guilty, objecting to perceived deficiencies in its findings of fact in support of that verdict may merely have led to a better explanation. In this regard, trial counsel may have reasonably concluded that simply letting any arguable deficiencies stand would enhance defendant's chances of attacking the findings of fact on appeal.

Lastly, defendant argues that trial counsel should have presented expert testimony regarding the decibel level of the noise made by motorcycles of the type defendant was riding. However, in light of defendant's failure to raise this issue below, he has not established that such expert testimony could have been obtained, let alone that it would have had a reasonable probability of benefiting defendant.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio